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No. 90-1354

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

E. W. SCRIPPS COMPANY,
THE KENTUCKY POST,
AL SALVATO - - - - - - - Petitioners

versus

LOUIS A. BALL - - - - - - - Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Al Salvato - - - - - - - - - *Petitioners*

v.

Louis A. Ball - - - - - - - - *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

Respondent adopts as his statement of facts, those summarized by the Supreme Court of Kentucky in its opinion, reprinted in the Petition. (Pet. 4a - 6a), and those mentioned in the body of this brief, particularly in the Conclusion.

REPONDENT'S REPLY TO QUESTIONS PRESENTED FOR REVIEW.

I. The Proposed Procedural Safeguard Of Special Interrogatories Is Not Essential To The Protection Of Freedom Of Expression.

The Petitioner's special interrogatories argument was presented to the Kentucky Supreme Court, which rejected it as not properly saved by specific objection under the Kentucky rules, and because the interrogatories submitted were "unsuitable and unreasonable." (Pet. 13a) Under

controlling precedent, the Court is "foreclosed" from reviewing such a determination unless the Court finds "this ruling 'lacks fair or substantial support' in prior (Kentucky) decisions." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 264, n. 4 (1964). Neither the requirements of the First Amendment nor the Fourteenth Amendment Due Process Clause mandate the highly formalized and complicated procedure suggested by Petitioner. Indeed, the novel, if not radical, nature of this proposal is amply evidenced by the absence of *any* libel precedent cited by the Petitioners which requires such special interrogatories as a matter of federal constitutional law.

The Court has rejected numerous suggestions of Due Process and/or First Amendment-based special restrictions on libel trials in addition to the "rather drastic limitations" of the *New York Times* decision. *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976) at 457. Thus, there is no requirement of special evidentiary rules protecting the editorial process, *Herbert* v. *Lando*, 441 U.S. 153 (1979), 169-76, or a mini-trial on falsity as a precondition to discovery of such information, *id.* at 174-75, n. 23, or residency as a precondition to libel jurisdiction, *Keeton* v. *Hustler Magazine*, 465 U.S. 770, 780-81 (1984), or a limitation on nationwide damages under the "single publication" rule, *id.* at 774-76, or a special jurisdictional immunity of individual reporters or editors writing in their official capacity, *Calder* v. *Jones*, 465 U.S. 783, 786-91 (1984), or that determinations of constitutional fault be by a jury rather than an appellate court, in the first instance, *Firestone*, 424 U.S. at 461-63, or a higher level of fault for punitive damages than for compensatory damages, *Butts* v. *Associated Press*, 338 U.S. 130, 160-61, (1967), *Gertz* v. *Robert Welch*, 418 U.S. 323, 349-350 (1974), or special rules of vicarious liability. *Can-*

trell v. *Forest City Publishing Co.*, 419 U.S. 245, 253 (1974). As the Court has repeatedly indicated, it has "already declined in other contexts to grant special procedural protections to defendants in addition to the constitutional protections embodied in the substantive laws." *Calder*, 465 U.S. at 790-91; *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 256, n. 7 (1986)

A brief perusal of the Kentucky approach evidences clearly the meritless nature of Petitioners' argument for radical transformation of Kentucky law. In the decision of *Young* v. *J. B. Hunt Transp., Inc.*, 781 S.W.2d 503, 506-07 (Ky., 1989), the Kentucky Supreme Court described its traditional posture as to use of "bare bones" instructions with "supplementation, elaboration, and detailed explanation [of them] falling within the realm of advocacy:"

> Contrary to the practice in some jurisdictions where the trial judge comments at length to the jury on the law of the case, the traditional objective of our form of instructions is to *confine the judge's function to the bare essentials and let counsel see to it that the jury clearly understands what the instructions mean and what they do not mean* . . . " [it is] clear that in the absence of a compelling reason to do otherwise, *counsel is entitled to considerable latitude* during argument . . . The *best way to safeguard litigants' rights to a fair verdict is to allow counsel to inform the jury of the legal effect* [of apportionment of liability] *and argue the significance of such determination in the context of the overall result. In so doing, counsel will not have to wonder what the jury knows or suspects and will be able to fully and accurately argue the case upon the evidence presented and confront the jury with the instructions of the court.* (emphases supplied).

In other words, Kentucky requires in libel litigation that the "bare bones" of the controlling First Amendment doctrine be contained in the instructions (which the court in *Ball* found and Petitioners do not deny), and that counsel have "considerable latitude" in discussing them and applying them to the facts. Both Petitioners' (T. 1639-59) and Respondent's (T. 1660-77) trial counsel took advantage of this entitlement and discussed the law and facts in detail. Indeed, Petitioners' trial counsel took substantial literary license with the *New York Times* criterion, repeatedly stating that Respondent must show knowing falsity (T. 1645, 1650, 1657, 1658, 1659).

In order to adopt petitioners' proposal the Court would have to discard its traditional deference to the states once the minimal constitutional threshold requirements are met, *Gertz*, 418 U.S. at 347-48, *Dun & Bradstreet* v. *Greenmoss Builders*, 472 U.S. 749, 757-63 (1985), and its specific deference to state courts which have "wide experience in framing appropriate jury instructions in tort actions." *Gertz*, 418 U.S. at 350. Indeed, the Court has heretofore explicitly rejected any such constitutionally-mandated, highly intrusive revision of state tort law allocations of fact-finding responsibilities: "The First and Fourteenth Amendments do not impose upon the State *any limitations as to how, within their own judicial systems, fact-finding tasks shall be allocated*," (emphases supplied). *Firestone*, 424 U.S. at 461.

II. The Kentucky Supreme Court Properly Applied The Standard Of Independent Review Adopted By The Court In *Harte-Hanks Communications, Inc.* v. *Connaughton*.

The Petitioners' disparaging attack on the methodology of and resulting determination by the Kentucky Supreme Court lacks merit when measured against the Sixth Circuit

opinion in *Herte-Hanks* and the Supreme Court's opinion in affirmance. The Sixth Circuit's opinion interpreted *Bose Corporation* v. *Consumer Union*, 466 U.S. 485 (1984), as not requiring an independent—de novo review of "preliminary, operative, or subsidiary factual determinations anchored in credibility determinations but . . . [as] limited to a review of the ultimate conclusion of clear and convincing proof of actual malice." Any "contrary conclusion would usurp the role of jury . . . impinging a plaintiff's constitutional right to a jury trial." 842 F.2d 825, 842 (6th Cir. 1988). The court explicitly rejected the view of *Tavoulareas* v. *Piro.*, 817 F.2d 762 (D.C. Cire. 1987) *cert den.* 484 U.S. 870 (1987), which had rejudged the credibility of witnesses without the direct opportunity for observance, and reevaluated the weight of the evidence, denying thereby the plaintiff's right to a jury trial and the entitlement to "all reasonable inferences therefrom to be viewed in the light most favorable to the plaintiff." *Harte-Hanks*, 842 F.2d at 842. n. 11. The court then applied a "clearly erroneous" analysis to the subsidiary or operative facts "as reflected in the entire record of the evidence and assigning 'due regard' to the jury's opportunity to observe the demeanor of the witnesses . . ." It held that it was "unable to conclude that it is 'left with a definite and firm conviction that a mistake has been committed' by the jury in arriving at its subsidiary factual findings," i.e., it was not "clearly erroneous". *Id.* at 844.

The Sixth Circuit then reviewed the "entire record" to determine whether the "ultimate" conclusion of constitutional law, the constitutional malice—clear and convincing evidence standard, had been met. The court—having accepted the jury's finding as to subsidiary or operative facts "that bear up the issue of 'actual malice' as those facts

are mirrored by the record in its entirely" and having accepted "all reasonable inferences therefrom, including assessment of credibility in favor of the plaintiff"—then undertook an "overview or 'second look'" at the "entire record" as a precursor to its exercise of independent judgment on the "ultimate" constitutional fact. *Id.* at 845. This included evidence of motive and other circumstances evidencing the defendants' purpose and intent in making the publication. *Id.* Lastly, the court concluded that, viewed in the above framework, "(w)eighing the cumulative impact" of the subsidiary facts, the plaintiff had met the *New York Times* standard. *Id.* at 846.

The Supreme Court's majority opinion undoubtedly adopted the "most significant element" of the Sixth Circuit's opinion—deference to jury credibility determinations—as to at least "the necessarily found controverted facts, rather than making an independent resolution of that conflicting testimony." *Harte-Hanks Communications, Inc.* v. *Connaughton*, 109 S.Ct. 2768, 2701 (1989) (Scalia, J., concurring). Justice Kennedy found the majority's opinion not inconsistent with that of Justice Scalia, *id.* at 2700 (Kennedy, J., concurring), who adopted the view of the Sixth Circuit in its entirety, and found no justification for the Court majority's deference to only a limited number of permissible findings. Justice Scalia concluded that, in making the required individual assessment under *Bose—New York Times*, the Court must assume that the jury "made all the supportive findings it reasonably could have made." The courts have traditionally given such deference and "there is ultimately no alternative to it." *Id.* at 2701 (Scalia, J., concurring).

An unbiased analysis of the Kentucky Supreme Court's opinion evidences clearly that it followed the methodology

and approach of the Sixth Circuit and Supreme Court in *Harte-Hanks*. The Court developed in detail the subsidiary facts evidencing constitutional malice (Pet. 2a-6a) and then synthesized the defamatory matters complained of (Pet. 6a - 7a). It then concluded that "substantial evidence" supported the false and defamatory nature of the listed libels (Pet. 7a). Next, it discussed in detail its approach to independent review of the issue of constitutional malice by clear and convincing evidence. Noting the "*great deal of conflict*" in the testimony "as to what the witnesses were actually saying *when their various answers were compared one with another*," the court concluded that "*(i)solated answers are often ambiguous, so the question then becomes what is the import of the answer when considered in context*" (emphases supplied). Lastly, it followed the *Harte-Hanks* approach as to "underlying subsidiary or historical facts" and, as to conflicts in the evidence, concluded that review "still must be in terms of what the jury could find as the bare facts and what the jury *could reasonably infer from the testimony of witnesses when considered as a whole*" (emphases supplied). It accepted the jury's finding "when there is supporting evidence because we claim no superior ability to divine the truth by reason of judicial office . . ." (Pet. 8a).

Despite the double briefing and oral arguments with extensive references to the record, the court's aforesaid analysis and its reiterated conclusion that it found the ultimate constitutional fact—constitutional malice by clear and convincing evidence—to be met (Pet. 9a - 10a, 14a), Petitioners petulantly complain of the court's failure to analyze the evidence in detail. Petitioner's doubtlessly proceed in a faulty premise. The Court has rejected the contention that the Constitution requires that "in a libel

action an appellate court treat in detail by written opinion all contentions of the parties" — all that is required is a "conscious determination" of compliance with the appropriate fault standard. *Firestone*, 424 U.S. at 463. In truth, Petitioners' main concern appears to be the Kentucky Supreme Court's refusal to arbitrarily select a few pivotal facts for deference, and its application of the deferential standard to *all* determinations of fact by the jury. However, the court correctly construed *Harte-Hanks* in concluding that the Court's opinion is, "if not coextensive" with that of the Sixth Circuit, "seems nearly so" (Pet. 10a). The court's opinion on wholly inclusive deference to the jury is persuasive and is the only logical conclusion to be adopted from an analysis of and comparison of the Court's majority and concurring opinions.

Petitioners' self-righteous analysis of the common law malice issue as to the circumstances precipitating the series does not deny the basic facts in question — it only denies the *reasonableness of the inference* as to Petitioners' motivation therefrom. In other words, it is asking the Court to reject the *jury's decision* finding such linkage and substitute its *own inferences* in place thereof — a request contrary to the Court's standard of review in *Harte-Hanks*. The law is clear. Motivation to "get" Respondent was and is relevant evidence as to constitutional malice. *Herron* v. *King Broadcasting Co.*, 776 P.2d 98, 107 (Wash. 1989); *Cochran* v. *Indianapolis Newspapers, Inc.*, 372 N.E.2d 1211, 1221-22 (Ct.App.Ind. 1978); *Arber* v. *Stahlen*, 170 N.W.2d 45, 48 (Mich. 1969), *cert. denied*, 397 U.S. 924 (1970); *Cape Publications, Inc.* v. *Adams*, 336 So.2d 1197, 1199-1200 (Dt. Ct.App.Fla. 1976), *cert. denied*, 434 U.S. 943 (1977); *Indianapolis Newspapers, Inc.* v. *Fields*, 259 N.E.2d 651, 653-664 (Ind. 1970), *cert. denied*, 400 U.S. 930 (1970).

Petitioners' suggestion that no competent evidence of such a nexus — between the Bellevue investigations and Petitioners' articles — was admitted is laughable. Joe Chandler, a Bellevue police officer, was called to Bellevue High School in 1982 when Salvato was accused of trying to get three high school girls to do drugs with him. Salvato was not arrested but was ejected from the game (T. 802-04).

In 1983, Salvato worked on a Bellevue drug investigation with Assistant Chief Brumbach and Dave Patchell (T. 369-71) [whose libel is discussed, *infra*]. The former called Salvato concerning problems with the Bellevue police department (T. 375), which had become extremely divided with the Brumbach faction opposed to Chief Corbin and two other officers, including Joe Chandler (T. 377-78). At the conclusion of a state police investigation resulting from articles in *The Kentucky Post* a grand jury was convened but failed to indict anyone on the Bellevue force (T. 131). This failure resulted in the displeasure of *The Kentucky Post* and its editorial of July 2, 1984, denominating Respondent as "timid" (Pet. 28a). Shortly thereafter, Respondent and Salvato had a telephone conversation in which Salvato warned Respondent that, in substance, he would be "hearing" from Petitioners (T. 131-32). Salvato's "investigation" commenced shortly thereafter.

Based on these facts, the jury had reasonable and admissible evidence of a motive by Petitioners to "get" Respondent — clearly admissible under the precedent aforesaid.

The Petitioners' contention that the July 2, 1984 and November 26, 1984, articles were prejudicially allowed to be considered as evidence of constitutional malice is also without foundation. The Court allowed as evidence of constitutional malice in *Harte-Hanks* a prior editorial (not

complained of as defamatory) which "set the stage" for the later defamatory articles. 109 S.Ct. at 2694.

Petitioners likewise complain that the Kentucky Supreme Court's reference to "other evidence from witnesses too extensive to detail" of Salvato's "grudge" against Respondent (Pet. 6a) is without foundation in the record. This contention is specious. The selective use of information, the refusal to consider or review available contradictory information or sources, and the omission of matter contradicting Salvato's thesis are evidence of both common law and constitutional malice and are dealt with in more detail hereinafter. A few other illustrations are worthy of note.

Salvato declined to interview a Kentucky State Policeman when he concluded that he was quite complimentary of Respondent (T. 768-69). Similarly, Salvato interviewed a defense lawyer but terminated the interview when he disagreed with Salvato's position on Respondent (T. 664-665). Clearly, Salvato was attempting to solicit negative comments from interviewees, a motivation that evidences "an attitude disinclined towards the truth." *Cochran*, 372 N.E. 2d at 1221-11. At another point, Salvato misrepresented Judge Kopowski's plan "to bridge the gap between the prosecutor's office and the police" (T. 733). Such deliberate misquotation or misuse of a source is supporting evidence of constitutional malice. *Carey* v. *Hume*, 390 F. Supp. 1026, 1030 (D.D.C. 1975), *aff'd*, 543 F.2d 1389 (D.C. Cir. 1976).

Lastly, when Salvato began his investigation, he reviewed the records of criminal cases in Campbell Circuit Court. When he came across a case where a felony had been reduced to a misdemeanor, or a PFO charge had been dismissed, he wrote "good case" on his investigative notes.

The clear implication here is that Salvato embarked on his investigation with a goal to present Respondent as an incompetent prosecutor, which is evidence of common law malice relevant to constitutional malice. *Compare* the famous case of *Goldwater* v. *Ginsburg*, 414 F.2d 324, 329 and n. 2 (2nd Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970), where the court held that similar "highly selective" notations on research materials identifying only derogatory information evidenced a preconceived motive to defame.

III. The Evidence Of Record, Believed By The Jury, Clearly And Convincingly Evidences Constitutional Malice.

The discussion hereafter clearly demonstrates that the case law on constitutional malice compellingly justifies the Kentucky Supreme Court's affirmance of the verdict for Respondent. When viewed together with the persuasive supporting evidence of common law malice discussed *supra*, the evidence in support of the jury verdict is overwhelming.

A. The "Ballard Gayhart" Libel.

The facts underlying the "Ballard Gayhart" libel (*see*, Pet. 37a) are quite clear — it did not occur as stated by Salvato in the November 17, 1984 article (Pet. 37a). Respondent did not meet with Gayhart *alone* in his office. *See* the testimony of Respondent (T. 159); and Robert Patton, counsel for Gayhart (T. 497). In fact, Petitioner Salvato admitted at trial that he could not remember whether the alleged coercive interview with Gayhart occurred "in court or whether it was in his office." (T. 451). At trial Salvato also stated he could not remember what he had said about the purported "interview" in the article (T. 451). He did, however, concede that he did not confirm the content of

Gayhart's serious charges (T. 450), which imputed to Respondent unprofessional and unethical behavior. When he was asked whether he informed Respondent about the Gayhart allegations during a subsequent interview, he stated inconsistently that he did ask Respondent about the allegation (T. 450), but that he did not remember what he said (T. 451). Later, under cross-examination as to the "unusual, unethical" nature of a prosecutor meeting with a criminal defendant absent the presence of counsel, the thrust of the story, Salvato stated that he thought that he had disclosed that counsel was present at the Gayhart "interview" — a fact admittedly disclosed to him by Gayhart (T. 451). Reliance on the statements of such a highly questionable source (Gayhart was an oft-convicted felon) without further independent investigation evidences reckless disregard of falsity. As the Court said in *St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968), and reiterated in *Harte-Hanks*, 109 S.Ct. at 2686, "recklessness may be found where there are *obvious reasons to doubt the veracity of the informant or the accuracy of his reports*" (emphases supplied). It is clear that Gayhart — an older man with a prior record, serving a recently-imposed twenty year sentence, and facing revocation of probation in Ohio — so qualified and that Salvato was aware of these factors [T. 447] or related them in the story itself [Pet. 37a].

A great volume of decisional law was developed and applied the aforementioned *St. Amant* criterion to cases involving highly suspect sources. Thus, evidence of reckless disregard of falsity has been found where defendant relied on a source with a history of criminal deceit, *Pep* v. *Newsweek*, 553 F.Supp. 1080, 1092-1093 (S.D.N.Y. 1983), or dated hearsay from a notorious hoodlum, *Hinds* v. *Cowles Communications, Inc.*, 430 F.Supp. 1363, 1370 (N.D. Cal.

1977), *aff'd*, 623 F.2d 616 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981), or an informant with a history of bad check charges, *Butts*, 388 U.S. at 157, *St. Amant*, 390 U.S. at 732 and n. 3, *Harte-Hanks*, 109 S.Ct. at 2698, or a tabloid with a tendency to sensationalize and use anonymous allegations. *Mehau* v. *Gannett Pacific Corp.*, 658 P.2d 312, 322, 325 (Haw. 1983).

Such an investigatory deficiency in the presence of reliance on a "questionable source" "may tend to show that a publisher did not care whether an article was truthful or not, or perhaps that the publisher did not want to discover facts which would have contradicted his sources." *Pep*, 553 F.Supp. at 1003. Indeed, in this case Salvato did not even conduct "the most perfunctory investigation" found insufficient in *Gertz* v. *Robert Welch, Inc.*, 680 F.2d 527, 538 (7th Cir. 1982) [upholding an award of $400,000.00, including $300,000.00 in punitive damages], *cert. denied*, 459 U.S. 1226 (1983), in the face of obvious reasons to doubt the author-source.

Additionally, the conceded failure of Salvato to verify the serious charge of unprofessionalism with Gayhart's attorney also constitutes a failure to pursue an obvious source of corroboration and/or refutation. *Alioto*, 439 F.Supp. at 137. Indeed, the Court's decision in *Harte-Hanks* provides a striking parallel to Salvato's decision not to contact Gayhart's attorney. Here, as there, the focal issue was the credibility of the source but no contact was made with the one person who could have confirmed the underlying facts. Such a failure is "utterly bewildering" unless Salvato was "committed to running the story" —in such a case he had "good reason not to interview" him, as a denial "would quickly put an end to the story." *Harte-Hanks*, 109 S.Ct. at 2693.

Lastly, the absence of any mention of the presence of Gayhart's counsel at the alleged meeting, a fact Salvato conceded he had been informed of by Gayhart (T. 451), is itself highly probative of constitutional malice. Obviously, a story about a prosecutor negotiating with a criminal defendant through or in the presence of counsel is a commonplace scenario without which the criminal justice system would doubtlessly collapse. The only factor that makes the Gayhart "forced plea" — "ax over my head" aspect of the "Portrait of A Prosecutor" story newsworthy or useful to Salvato's thesis of Respondent as an incompetent and unethical prosecutor is the absence of Gayhart's counsel.

When Salvato consciously transformed the innocuous or bening into the defamatory and damning implication herein, the jury was permitted to find that such was sufficient evidence of reckless disregard of falsity by clear and convincing evidence. Thus, Salvato's deliberate omission of the reference to the presence of counsel may be a basis for liability since he "knowingly or recklessly misstated . . . evidence to make it more convincing or condemnatory than it is." *Westmoreland*, v. *CBS, Inc.*, 596 F.Supp. 1170, 1174 (S.D.N.Y. 1984).

B. The "Patchell" — "Crime After Crime" Libel.

> "HE TURNS THEM RIGHT BACK, AND THEY COMMIT CRIME AFTER CRIME. THEY COULDN'T HAVE A BETTER FRIEND.

The evidence concerning this headlined, dramatically depicted and patently defamatory quotation and its background are clear. The quote and this aspect of the story were attributed to David Patchell, a former narcotics officer. The story was printed despite specific knowledge of Salvato from information provided by Judge George Muehlenkamp,

who had, in the language of the Kentucky Supreme Court, "considerable experience" with Patchell (Pet. 6a), that Patchell was "a very poor police officer, totally unreliable" (T. 342). By contrast, Judge Muehlenkamp had indicated to Salvato that he had "no complaints" concerning Respondent — "he did a first class job" (T. 342). Aware that Salvato planned to use Patchell as a source, Respondent's Assistant Commonwealth Attorney, Kevin Quill, went to *The Kentucky Post* and Salvato before publication and tendered information from criminal files evidencing clearly that Patchell was unreliable. Both Salvato and *The Kentucky Post* refused to review the information (T. 894-95). Instead, the Petitioners published the headline and dramatic story of November 19, 1985.

At trial Salvato testified extensively, but without providing any significant information to substantiate the specific factual basis for the Patchell quotation. His attempt at citing examples (four) to support the "crime after crime" quotation is revealing. The listed examples provided nothing to justify the Patchell quotation. *See* the testimony of Kevin Quill (T. 1538-50). Salvato knew when he wrote this article that there were no cases of recidivism from Campbell County, since he had made a review of all criminal cases in Campbell Circuit Court going back several years at the inception of his investigation.

The law applicable to the above defamation clearly supports a finding that the published statements were made with reckless disregard of falsity. As stated above, the latter requirement is met "where there are *obvious reasons to doubt* the veracity of the informant or the accuracy of his reports." *St. Amant*, 390 U.S. at 732. (emphases supplied). In this case Salvato was informed by Judge Muehlenkamp who, as Salvato knew, was knowledgeable

about the Campbell County criminal justice system, that Patchell was "a very poor police officer, totally unreliable" (T. 342), while contemporaneously complimenting Respondent as dong a "first class job."

Additionally, Salvato's and *The Kentucky Post's* refusal to consider or review the evidence tendered to it demonstrating Patchell's non-reliability as a police officer is strong evidence of "an intent to avoid the truth." *Harte-Hanks*, 109 S.Ct. at 2698. The parallel to the latter decision is compelling. In that decision the defamed party tendered to defendants tapes of an interview that, like the information tendered here, was highly relevant to verifying the credibility of the primary source. *Id.* at 2693. If the Petitioners here were indeed interested in a fair and factual story, "truly in equipoise" in their investigation, *id.*, it is difficult to understand their refusal to peruse the materials Quill proffered. As a Court stated in *Harte-Hanks*, "one might reasonably infer . . . that the decision . . . was motivated by a concern they would raise additional doubts concerning [Patchell's] veracity." *Id.* at 2694. Instead, Petitioner's inexplicably, consciously ignored Quill's proffer of materials going to the core issue of Patchell's credibility as a source.

C. The Distorted Statistic Libels.

The uniform testimony of record compellingly evidences that the procedure for handling guilty pleas and possible reductions for all felonies (including persistent felony offender—PFO—charges) varies dramatically between Campbell and Kenton Counties.

Geographically, Campbell, Kenton and Boone Counties are located in the northernmost part of Kentucky, just

across the Ohio River from southwestern O! io (Hamilton County—Cincinnati) and southeastern Indiana.

In Kenton County plea nogtiations are initiated "very, very early" (T. 417) at "the initial stages" (T. 700) at a post-arraignment conference of the Kenton County Commonwealth Attorney and defense counsel at the District Court level (T. 812-16). If a plea is reached, an information is "tailored" and the reduction in felony and/or PFO charges is never reflected in Kenton County Circuit Court records (T. 414-18, 559-60, 681-85, 700, 812-18, 840-45, 1241, 1256). By striking contrast Campbell County (where Respondent is Commonwealth Attorney) does not "weed out" the weak cases referred to the Grand Jury by the District Court, but *only* negotiates following the issuance of a grand jury indictment (T. 146-47, 180-81, 238, 558, 684, 700, 948-50). In fact, the clear weight of the evidence is that plea negotiations are approximately equal in severity in both counties (T. 950), or, if any variance is discernable, slightly tougher in Campbell County (T. 558).

The "statistics" constructed by Salvato and reported in *The Kentucky Post* bear little resemblance to the accurate data presented at trial or to any criminal justice system operating within the realm of feasibility. For example, a brief perusal of the PFO rates table (#4) [Pet. 40a] reflects that the percentage of convictions in Kenton County was approximately 2000% of that in Campbell County in 1983; the percentage of dismissals in Campbell County for that year was over 600% higher than in Kenton County. Other years' statistics are only slightly less implausible. The other statistical table, "How felony cases are handled" (#5) [Pet. 40a], reflects that supposedly lenient Campbell County and supposedly harsh Hamilton County (Ohio) are roughly comparable in percentages of pleading guilty to the

charge in the indictment and pleading guilty to a lesser charge. However, both compare poorly with the incredibly favorable statistics in Kenton County.

Moreover, research by Salvato on Boone County records indicated that that county, led by a prosecutor Salvato deemed to be a prototypical "tough" prosecutor (T. 403), showed that, in the previous four years all but two PFO indictments were dismissed. (T. 386, 403-045, 445). Salvato admitted that he had been "frankly . . . shocked" by such figures (T. 445), but had not published the refutative information (T. 404). Did these facially improbable statistics based on selective use of acquired information lead Salvato or *The Kentucky Post* to double-check their statistics? The answer is "No." Indeed, Salvato seemed quite uninterested in verifying these figures. Salvato was offered the opportunity to peruse files in Respondent's office (T. 898), but did not make use of the informational opportunity (T. 141). Furthermore, monthly disposition sheets of all criminal cases in Campbell County Circuit Court were readily available in Bell's office (T. 546), as were state statistics from the Administrative Office of Courts by phone call (T. 542). Indeed, Salvato was provided with a set of official statistics from the latter, but did not use them (T. 898). Incongruously, he did rely on compiled statistics from the Court Clerk's office in Hamilton County and did not look at Court records. (T. 386). Concerned at the clear disinterest of Salvato as to these available, authoritative sources of information, Judy Clabes, the editor of *The Kentucky Post*, was advised of the concern that Salvato was ill-informed about statistics and was not going to provide an accurate picture of the real facts. She "somewhat sarcastically" stated that the story would be accurate. (T. 893).

The consensus testimony of the record persuasively demonstrates that the above statistics are not only facially improbable, but also that any such comparison between Kenton and Campbell Counties is unfair, invalid, and misleading (T. 180-81, 238, 554-564, 612-614, 948-50).

Salvato admittedly knew of this difference (T. 391-392) and had told Mike Phillips, the managing editor, of it. (T. 1059, 1141). As in *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245, 253 (1974), Salvato "must have known" from his own awareness of the major differences in the Campbell and Kenton criminal justice systems that the defamatory statements resulting from the "apples and oranges" comparison, to use Professor Robert Lilly's evocative expression (T. 558), were deliberately false.

The black letter law clearly concludes that a defendant "cannot feign ignorance or profess good faith where there are clear indications present which bring into question the truth or falsity of defamatory statements." *Gertz*, 680 F.2d at 538. More specifically, "an inference of actual malice can be drawn when a defendant publishes a defamatory statement that contradicts information known to him, even though the defendant testifies that he believes that the statement was consistent with the facts within his knowledge." *Hunt* v. *Liberty Lobby*, 720 F.2d 631, 645 (11th Cir. 1983).

In the powerful language of *Schiavone Constr. Co.* v. *Time, Inc.*, 847 F.2d 1069, 1092 (3rd Cir. 1988), the court concluded that the *New York Times* standard can be met "(w)here the defendant finds internal inconsistencies or apparently reliable information that contradicts its libelous assertions but nevertheless publishes these statements anyway" and chooses to delete information that would present the true scenario in "a very different and more benign light . . ." *Id.* at 1090-92.

In addition to the undoubted, knowingly misleading use of the statistical comparison discussed in detail above, Salvato also transposed the figures relating to jury trial conviction rates for *two consecutive years* (T. 460, 1191), which dramatically and radically reversed the significance of the simple mathematical data that even an elementary school student could have dealt with competently and efficiently. (Salvato compared Kenton and Campbell for four years. In two of those years, Campbell had 12 guilty and 4 not guilty verdicts in 1981, and 9 guilty and 3 not guilty in 1982. Salvato transposed these figures to obtain results which made it appear that Ball lost about half of his cases, while Kenton County lost only about 30% of its cases. If the figures were correctly compiled, Ball's record would have been better than Kenton's.)

Had the simple figures not been transformed, they would have been useless to Salvato. Indeed, the correct figures would have undermined, probably irreparably, the picture Salvato was endeavoring to paint in the article. Salvato's testimony attempted to portray this double transposition as mere negligent, good faith miscalculation (T. 460-61, 1991). However, the jury was not required to buy Salvato's testimony. As the Court has trenchantly stated, defendant "cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith." *St. Amant*, 390 U.S. at 732.

D. The "Scores Of Delays" Libel.

Despite the highly pejorative nature of this libel, imputing unethical dilatoriness and impingement of criminal defendants' rights to a speedy trial, Salvato's testimony

viewed as a whole, lacks credibility, as the jury apparently concluded. Salvato initially testified that he was unable to define "scores," but ultimately conceded that a "score" could be defined as "twenty" (T. 454). In fact, he admitted that this word was consciously used instead of less damaging and condemnatory alternatives. (T. 454). Salvato then testified that the continuances were sought and received by the Commonwealth and defendants' counsel on an "equal basis" (T. 454-55). He conceded that his chart (Pet. 41a) "suggested strongly" that "these delays" were attributable *only* to the Commonwealth's Attorney's continuances (T. 456). The evidence on cross-examination and otherwise during the trial indicates clearly that the "scores of delays" libel was without basis. Respondent testified that he had "very little input" into trial scheduling and that this was under the "complete control" of the Circuit Court Judge (T. 156-58). Judge Muehlenkamp stated that Respondent "very, very rarely" sought continuance, but that he received "frequent requests" from defense counsel. He further testified that he "controls" the court calendar, that Respondent's office functioned in an "excellent" fashion, and that he had informed Salvato during an interview that Respondent's office did "a first class job" and that he had "no complaints" regarding its performance (T. 339-40).

Circuit Judge Leonard Kopowski likewise rejected any suggestion of "dilatory" conduct or "frequent" delays by Respondent's office (T. 722), as did former Circuit Judge Thomas Schnorr, who stated the continuances by the Commonwealth's Attorney's office were so "rare" he could not remember any "specific" example thereof (T. 962). The only other testimony by participants in the criminal justice system—by Respondent's assistant (T. 874-75) and a defense counsel (T. 958)—similarly concluded that no fre-

quent or unnecessary delays were sought by Respondent's office. By contrast, Salvato's testimony is highly revealing. He cited as support for his libelous statement "some records that I don't have" — he testified he did not know where the notes or records on delys by Respondent's office and criminal defense counsel were. He "may have" lost them (T. 455-56). Salvato conceded that he had been directed to bring them to trial for use in conjunction with his cross-examination. His only other cited source was a former Circuit Court Judge (T. 453) whose testimony was not adduced at trial. He conceded Respondent had told him he never "unnecessarily delayed" cases (this was quoted in the article) (T. 457) and he admitted he knew that the two Circuit Judges had been ill during the period in question (T. 458). However, he adhered to the position that the delay problem was due to Respondent's office (T. 458).

In the course of his interviews with Judges Muehlenkamp and Kopowski, Salvato also failed to ask them about continuances granted at the request of Ball's office. If he had, the "Scores of Delays" story would have gone down the tube.

The above summary evidences clearly and convincingly that Salvato deliberately conveyed a false impression attributing the delay "problem" to the Respondent. His deliberate choice of the word "scores" and his admission that his story and chart "suggested strongly" that the Commonwealth's Attorney's office was the cause of unnecessary delays is clearly qualitatively different from the admitted facts.

The law is clear. A jury may find reckless disregard of falsity where a reporter "knowingly or recklessly misstates that evidence to make it seem more convincing or

condemnatory than it is." *Westmoreland*, 596 F.Supp. at 1174.

The case law clearly allows a jury to infer reckless disregard where documents or notes are purposefully withheld or destroyed in bad faith. *Brown & Williamson Tobacco Co.* v. *Jacobson*, 827 F.2d 1119, 1134-36 (7th Cir. 1987). [The jury may draw the inference such evidence would have "seriously damaged" defendants' libel defense], *cert. denied*, 485 U.S. 993 (1988).

A review of the evidence delineated in detail above also suggests that there was no objective or even colorable basis for the "scores of delays" libel, that the damaging "scores of delays" libel was "fabricated by the defendant . . . the product of his imagination . . ." *St. Amant*, 390 U.S. at 732.

Viewed in the best possible light for Petitioners, the "scores of delays" libel was at least published in reckless disregard of falsity. Salvato acknowledged he knew the two judges were ill during the period in question, he knew Respondent denied unnecessary delays and attributed such to judicial illnesses, and he knew that Judge Muehlenkamp had been highly complimentary of the operation of Respondent's office. Yet, in the face of such contradicting evidence he imputed to Respondent's office extreme dilatoriness in prosecuting cases— ignoring his own research that, if delays occurred, they were attributable *equally* to both prosecutors and defense counsel. Publication of such a serious charge with notice of probative, contradictory information "warrants submission to the jury of the question of whether [defendants] acted with reckless disregard of the falsity thereof." *Levine* v. *CMP Publications*, 738 F.2d 660, 675 (5th Cir. 1984).

E. The "Cinema X" Libel.

"Police say Ball was not involved in that (Cinema X) investigation, despite a request from Twehues." Paul Twehues was County Attorney for Campbell County, prosecuting misdemeanors, while Ball was Commonwealth's Attorney prosecuting felonies. Cinema X was a porno theater in Newport, which fell under Twehues' jurisdiction. There was much public pressure to close Cinema X, and to rid Newport of its old "Sin City" image. Clearly, Petitioners' article was calculated to take advantage of the prevailing climate of public sensitivity on issues of public corruption.

In this context this extremely damaging suggestion of deliberate dereliction of duty carried the worst possible connotation, indicating the need for careful verification. The testimony adduced at trial clearly refutes any suggestion such a "refusal" ever occurred. Respondent testified no "request" was ever made, but that he in fact assisted Mr. Twehues, the County Attorney, through the grand jury process. Twehues wrote Ball a letter of thanks, and Salvato received a copy of it (T. 169-71.) The testimony of Respondent's assistant, Kevin Quill, confirms the receipt thereof by Salvato and that he "kind of threw them (the letter and another item) on the desk" (T. 896). When asked about his sources for the "refusal" statement, Salvato testified: "I think Mr. Twehues and backed up by Mr. Hetteberg" (T. 489). The purported latter source did not testify.

Mr. Paul Twehues testified that he told Salvato that he had always had "a good working relationship" with Respondent's office and that the statement attributed to him— "Twehues said that Ball could have asked a grand jury to compel the theater and book store owners to present evi-

dence of ownership before trial"—was made in the "context" of a discussion of the "special" grand jury that *had been empaneled*, with Ball's help. Salvato had asked Twehues whether a "special" grand jury was required or whether a "regular" grand jury was sufficient (T. 672-73).

Publication of the "refusal" statement in the face of Twehues' letter constitutes, at worst, a sheer fabrication, or at best reckless disregard of falsity. Indeed, the treatise written by Petitioners' Counsel of Record, Bruce Sanford, states the applicable rule succinctly:

> When a defendant has ignored credible information that disputes the accuracy of its publication, courts have found that it may have acted with actual malice.

B. Sanford, *Libel and Privacy: The Prevention and Defense of Litigation* 331 (1985).

CONCLUSION

As Chief Justice Warren said, "Freedom of press under the First Amendment does not include absolute license to destroy lives or careers." *Butts*, 388 U.S. at 170.

Although underlying facts are not subject to independent de novo review, under *Harte-Hanks*, that issue is not presented in this case, since the salient underlying facts are largely undisputed, to wit:

> Salvato was thrown out of the Bellevue football game by Bellevue Police officer Joe Chandler.
>
> Salvato was disappointed when the investigation into the Bellevue Police Department, which he instigated, failed to produce indictments.
>
> When Salvato began his "investigation" he reviewed the criminal case records in Campbell Circuit Court, and when he found a case where a felony was reduced

to a misdemeanor, or a PFO was dismissed, he marked in his notes that is was a "good case."

There was a significant difference in the way felony cases were handled in Kenton and Campbell Counties, which Salvato knew.

The delays in jury trials were due to illnesses of the two Circuit Judges, not because Ball asked for scores of continuances.

Salvato did not ask the sitting Circuit Judges about continuances granted at the request of Ball's office, though the interviewed both of them.

Salvato failed to produce any records substantiating his "scores of delay" story, although he was requested to do so.

Salvato, wittingly or carelessly, transposed trial success statistics so they falsely portrayed that Ball's office was much less successful at trial than Kenton County, when the true statistics that Salvato had compiled showed that Ball's record was as good as or better than Kenton County.

Salvato published and headlined the David Patchell quote without having any statistical or other supporting documentation.

Salvato and the Post refused to review proffered material relating to Patchell's unreliability.

Salvato was told by Judge Muehlenkamp that Patchell was unreliable.

Salvato quoted Ballard Gayhart impugning Ball's ethical conduct, knowing Gayhart was a convicted felon, without so much as interviewing Gayhart's lawyer, without asking Ball about it, and even though he knew that Gayhart's lawyer was present in this plea bargaining session.

Salvato was given a letter from County Attorney Paul Twehues to Ball, thanking Ball for his assistance in the Cinema X Grand Jury proceedings.

Based on these underlying facts and inferences which may be drawn therefrom by the jury, none of the articles would have been newsworthy, nor would they have supported the "Portrait of a Prosecutor" theme that Louis Ball was an incompetent official. It is quite clear that Salvato and the *Kentucky Post* embarked on this shameful and malicious attack simply to "get" Ball, letting the devil take the hindmost.

Constitutional actual malice was clearly and convincingly demonstrated, not only to the jury, but to the de novo scrutiny of the Kentucky Supreme Court in a unanimous decision. As the Supreme Court of Kentucky stated in its opinion (Pet. 2a): *The prominence of the defamatory material displayed in the articles in question can only be appreciated by viewing the newspaper as printed.*

The tardy attack on jury instructions is simply not supported by any previous decisions. Furthermore, the instructions were in full accord with Kentucky law. Accordingly, the Petition should be denied.

Respectfully submitted,

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